Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-240

In the Matter of

Accounting for Judgments and
Other Costs Associated with
Litigation

NOTICE OF PROPOSED RULEMAKING AND ORDER

Adopted: August 23, 1993; Released: September 9, 1993

Comment Date: October 15, 1993
Reply Comment Date: November 5, 1993

By the Commission:

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I. INTRODUCTION

1. In the *Litigation Costs Proceeding*,[1] the Commission established accounting rules and ratemaking policies for litigation costs incurred by carriers in federal antitrust lawsuits and other cases involving violations of federal statutes.[2] The United States Court of Appeals for the District of Columbia Circuit vacated and remanded these rules and policies to the Commission. In the court's view, the Commission had neither sufficiently justified the scope of the rules and policies, nor fully considered their probable effects upon carriers' behavior.[3] In light of the court's remand, we consider anew the issue of the accounting rules and ratemaking policies applicable to litigation costs.

II. BACKGROUND

A. The *Litigation Costs Proceeding*

2. Prior to the *Litigation Costs Proceeding*, the Commission took an *ad hoc* approach to the accounting and ratemaking treatment accorded litigation costs.[4] The *Litigation Costs Proceeding* was initiated in response to the need for a clear policy on how litigation costs should be recorded on the carriers' regulated books of account.[5] Although the Commission did not adopt conclusive ratemaking rules in regard to litigation costs, as a practical matter, the accounting rules and ratemaking policies adopted therein had an impact on the carriers' ability to recover such costs from ratepayers.

3. The guiding principle for the accounting rules adopted in the *Litigation Costs Proceeding* was that certain litigation costs were not "normally the byproduct of activities that benefit ratepayers."[6] To implement this principle, the Commission adopted accounting rules and ratemaking policies which would not allow these costs to be routinely passed on to ratepayers. The Commission divided litigation costs into three categories: judgments; settlements; and other litigation expenses, *e.g.*, trial expenses. Specifically, the rules required judgments and settlements to be recorded in a nonoperating or below-the-line account, Account 7370, Special Charges.[7] Recording an expense in a nonoperating account generally signifies that the expense is presump-

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[1] Notice of Proposed Rule Making to amend Part 31 Uniform System of Accounts for Class A and Class B Telephone Carriers to Account for Judgments and Other Costs Associated with Antitrust Lawsuits, and Conforming Amendments to the Annual Report Form M, *Report and Order*, 2 FCC Rcd 3241 (1986) (*Litigation Costs Order*), *recon.*, 4 FCC Rcd 4092 (1989) (*Litigation Costs Recon. Order*) (collectively, *Litigation Costs Proceeding*), *vacated and remanded sub nom.*, Mountain States Tel. and Tel. Co. v. FCC, 939 F.2d 1035 (D.C. Cir. 1991) (*Litigation Costs Decision*).

[2] Throughout this Order we will also refer to the accounting rules and ratemaking policies adopted in the *Litigation Costs Proceeding* collectively, as the litigation costs rules.

[3] *Litigation Costs Decision*, 939 F.2d at 1042.

[4] *See* American Tel. and Tel. Co., *et al.*, Accounting Instructions for the Judgment and Other Costs Associated with the *Litton Systems* Antitrust Lawsuit, 98 FCC 2d 982 (1984) *recon. denied*, 3 FCC Rcd 500 (1988) (collectively, *Litton Accounting Proceeding*), *vacated and remanded sub nom.*, Mountain States Tel. and Tel. Co. v. FCC, 939 F.2d 1021 (D.C. Cir. 1991) (*Litton Accounting Appeal*). *See also* Policy to be Followed in the Allowance of Litigation Expenses of Common Carriers in Ratemaking Proceedings, *Notice of Inquiry*, 70 FCC 2d 1961 (1979), *Memorandum Opinion and Order*, 92 FCC 2d 140 (1982).

[5] *Litigation Costs Order*, 2 FCC Rcd at 3241.

[6] *Id.* at 3244.

[7] 47 C.F.R. § 32.7370. Originally, judgments were to be recorded in account 7620, but in the *Litigation Costs Recon. Order*, the Commission determined that account 7370 was the more appropriate account. *Litigation Costs Recon. Order*, 4 FCC Rcd at 4099.

tively excluded from carriers' revenue requirements. Other litigation expenses were to be recorded in operating or above-the-line accounts, such as Account 6725, Legal expenses. Recording expenses in operating accounts generally creates a presumption of inclusion of these expenses in carriers' revenue requirements.

4. At the same time, the Commission announced ratemaking policies that, in some cases, presumptively altered the presumptions that attach to the accounts in which these litigation costs were recorded.[8] For pre-judgment settlements, a carrier could presumptively include in its revenue requirement the "nuisance value" of the case.[9] Other litigation expenses associated with either an adverse judgment or a post-judgment settlement were to be subject to "recapture." The recapture policy presumptively required these expenses to be excluded from a carriers' revenue requirement in the subsequent access tariff filing and the related AT&T tariff filings.[10]

B. The *Litigation Costs Decision*

5. On appeal, carriers sought review of virtually every aspect of the litigation costs rules. The court reversed the Commission's Orders for two limited reasons. First, the court found that, although the Commission had adopted accounting classifications and presumptions with respect to all violations of federal statutes, it did not adequately justify the application of the litigation costs rules beyond the antitrust context. Second, the court found that the Commission had not sufficiently considered the incentive effects the rules and policies had on carriers' behavior.[11]

6. Although the court vacated the *Litigation Costs Proceeding* in its entirety, the court explicitly endorsed the principle underlying the Commission's accounting treatment of antitrust judgments:

> We start with the proposition that it is a legitimate aim of rate regulation to protect ratepayers from having to pay charges unnecessarily incurred, including those incurred as a result of the carriers's illegal activity - of whatever sort.... The theory of the antitrust laws supports the FCC's observation that activities that give rise to antitrust liability do not generally benefit ratepayers... The Commission acted quite reasonably, however in aligning the presumption (against recovery) with the majority of antitrust cases, in which consumers do not benefit from the conduct occasioning liability.[12] The court also agreed that the accounting for settlements was reasonable.[13] Finally, the court also extended this principle to the ratemaking policy the Commission adopted in regard to other litigation expenses, whether the result of the case is an adverse judgment or settlement.[14]

III. DISCUSSION

A. The Continued Need for Litigation Costs Rules

7. AT&T, the Bell Operating Companies (BOCs), and a number of other large local exchange carriers (LECs) are now under price cap regulation. Presumptions regarding the inclusion or exclusion of expenses in a carrier's "revenue requirement" do not affect the development of rates under our price cap formulas. Nevertheless, we tentatively conclude that there is a continued need for litigation costs rules. AT&T and the LECs must still maintain regulated books of accounts, and the accounts must continue to be kept in accordance with the rules and policies of this Commission. Moreover, price cap LECs are subject to a sharing mechanism. Under this mechanism, a price cap LEC must share with ratepayers a portion of its regulated interstate earnings above a certain level. The operating/nonoperating distinction is a factor in determining whether a price cap LEC is within that sharing zone.[15] Thus, the rules continue to affect the price cap LECs. Finally, there are still over 1300 LECs subject to rate of return regulation. Litigation costs rules are still needed to prevent these LECs from recovering through regulated rates expenses incurred as a result of unlawful conduct that does not benefit ratepayers.

8. Because we tentatively conclude that there is a continued need for litigation costs rules, we propose to adopt accounting rules and ratemaking policies applicable to antitrust judgments, antitrust settlements, and other antitrust litigation expenses. However, we seek comment on our proposals. We also invite commenters to suggest alternatives to our proposals. In addition, we seek comment on whether, and to what extent, such rules should be applicable to other areas of the law. As an interim measure, we require the carriers to place any antitrust judgments or settlements for which they become liable in the interim period between release of this Notice of Proposed Rulemaking and Order and adoption of rules in a balance sheet deferral account, Account 1439.[16]

B. Antitrust Litigation Costs

1. Adverse Antitrust Judgments

9. In the *Litigation Costs Proceeding*, the Commission explained that the activity which leads to an adverse antitrust judgment, anticompetitive behavior, "rarely, if ever, produces any benefit for ratepayers."[17] As a result, the Commission concluded, such expenses should be recorded in a nonoperating account and should not routinely be passed onto ratepayers. The court in the *Litigation Costs Decision* agreed with this rationale and with this account-

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[8] We note that, although the presumptions for ratemaking were altered, the accounting classifications were not.

[9] *Litigation Costs Recon. Order*, 4 FCC Rcd at 4097-4098.

[10] *Litigation Costs Order*, 2 FCC Rcd at 3247. The recapture policy was rebuttable if carriers could make a clear and convincing argument that such expenses should be borne by ratepayers.

[11] *Litigation Costs Decision*, 939 F.2d at 1042.

[12] *Id.* at 1043.

[13] *Id.* at 1046.

[14] The court, however, did state that the Commission failed to adequately address objections by the carriers that the "recapture" mechanism constituted retroactive ratemaking. *Id.* at 1044.

[15] A carrier determines if it is in the sharing zone by calculating its earned rate of return. Since operating expenses are a component of that calculation, including or excluding costs in operating expense accounts directly affects the carriers' earned rate of return. For example, if an antitrust judgment were included in operating expenses, it would cause the carrier's earned rate of return to decrease, all other things remaining constant.

[16] 47 C.F.R. § 32.1439.

[17] *Litigation Costs Order*, 2 FCC Rcd at 3244.

ing treatment.[18] We continue to believe this principle, and propose to require antitrust judgments be recorded in a nonoperating account. We invite comment on this proposal.

10. We propose to amend Section 32.7370 of our Rules to require that carriers record antitrust judgments in Account 7370, Special charges.[19] Account 7370 is used for costs that are typically given special regulatory scrutiny for ratemaking purposes. Unless a carrier gives specific justification to the contrary, costs in Account 7370 are presumed excluded from the costs of service in setting rates. A carrier would be permitted to argue, in the ratemaking process, that a particular judgment should be included in its revenue requirement. We continue in our view, however, that "[v]ery compelling evidence would, of course, be required" to show that ratepayers so benefitted from a carrier's violation of the antitrust laws that they should be required to bear the costs of an adverse judgment.[20]

2. Antitrust Settlements

11. In the *Litigation Costs Decision,* the court agreed that this Commission could require carriers to record antitrust settlements in a nonoperating expense account:

> Once it [the agency] requires the judgment of a certain type of action be recorded below the line, failing to accord similar treatment to a settlement of the same action would create a strong incentive for a carrier to settle such a suit even if the settlement is for an amount greater than the expected liability. In any case, failing to require settlements to be recorded below the line would obviously compromise the integrity of the regulatory scheme; if the activity resulting in the lawsuit was for the benefit of the carrier, rather than for that of the ratepayers, there is no reason for requiring ratepayers to pay the cost of the settlement.[21]

We also continue to believe that this approach is most consistent with the underlying principle that expenses not incurred for the benefit of ratepayers should not be routinely passed on to ratepayers. We therefore propose to require carriers to record antitrust settlements in Account 7370 and to amend the language in that account to include settlements. As with antitrust judgments, the carrier would have the opportunity to demonstrate that the behavior that gave rise to a particular lawsuit did in fact benefit ratepayers. We seek comment on this proposal.

12. We also seek comment on whether we should readopt a ratemaking policy that allows a carrier presumptively to include in its revenue requirement the "nuisance value" of a lawsuit if a settlement is reached prior to judgment. The Commission adopted this ratemaking policy in the *Litigation Costs Proceeding* because it did not "wish to discourage settlements when such action is in the best interests of the ratepayers."[22] It declined to extend the same presumption to settlements reached after judgment on the basis that, when an adverse judgment has been entered by a court, the carrier should bear a heavier burden to "show why ratepayers should bear any cost of a subsequent settlement."[23]

13. In the *Litigation Costs Decision,* the court accepted the concept of a nuisance value exception to the presumption against recovery of settlements, but found that the Commission had not adequately considered the incentive effects of the pre-judgment/post-judgment distinction:

> [T]he economics of the two are identical. As the agency recognized in the pre-judgment context, if the carrier cannot recover what it pays out in a settlement then it has an incentive to continue litigation - in the post-judgment context, to pursue an appeal - even if the cost of doing so exceeds the amount for which it could settle the case.[24]

14. The court is, of course, correct that denying recovery of the nuisance value portion of a post-judgment antitrust settlement creates an incentive for a carrier to continue to litigate after an adverse judgment. Under our proposed policies regarding other litigation expenses,[25] this incentive would be detrimental to ratepayers only in cases in which the carrier ultimately prevails on appeal. In such cases, all of the expenses of the litigation might be recovered from ratepayers, even if the case could have been settled for a lesser amount. Ratepayers would not be harmed, however, when further litigation results in an adverse judgment being upheld, since the judgment and all of the associated expenses in such cases would be presumptively excluded from revenue requirements.

15. On the other hand, if we extend the nuisance value exception to post-judgment antitrust settlements, ratepayers may pay to settle some cases in which the adverse judgment might have been upheld on appeal. Moreover, ratepayers will pay for the settlement of cases in which a court has already found that the carrier engaged in unlawful behavior that presumptively did not benefit ratepayers. We tentatively conclude that the incentive to litigate that we would create by readopting the pre-judgment/post-judgment distinction is not so harmful to ratepayers that it warrants abandoning that distinction. We seek comment on this conclusion and invite parties to suggest ways in which we might limit the effects of this incentive.

3. Other Antitrust Litigation Expenses

16. In the *Litigation Costs Order,* the Commission decided that litigation expenses were to be accounted for in operating accounts, but that they were to be subject to recapture if the case they were associated with resulted in an adverse judgment or post-judgment settlement. The court agreed that this Commission could "reasonably erect a presumption against the recovery of litigation expenses wherever [we] may do so with respect to judgments and

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[18] *Litigation Costs Decision,* 939 F.2d at 1043 ("The Commission acted quite reasonably, however, in aligning the presumption (against recovery) with the majority of antitrust cases, in which consumers do not benefit from the conduct occasioning liability.").

[19] 47 C.F.R. § 32.7370(d).

[20] *Litigation Costs Order,* 2 FCC Rcd at 3244.

[21] *Litigation Costs Decision,* 939 F.2d at 1046.

[22] *Litigation Costs Order,* 2 FCC Rcd at 3246.

[23] *Litigation Costs Recon. Order,* 4 FCC Rcd at 4098.

[24] *Litigation Costs Decision,* 939 F.2d at 1047.

[25] *See infra,* paras. 17-19.

settlements."[26] However, the court also stated that the Commission had failed adequately to explain why the recapture policy did not constitute retroactive ratemaking.[27]

17. After careful consideration of the recapture policy, we believe a different approach to the treatment of other antitrust litigation expenses would more fairly balance the interests of carriers and ratepayers. We propose to require carriers to accrue other antitrust litigation expenses in a balance sheet deferral account until the case is resolved.[28] Upon entry of an adverse nonappealable final judgment or post-judgment settlement, these expenses would be charged to account 7370. Should the case be resolved in favor of the carrier, the expenses would be amortized above-the-line for a reasonable period. This type of accounting is used in other circumstances in which it is not possible to determine initially whether an expense belongs in an operating or a nonoperating account.[29] We tentatively conclude that this approach treats carriers and ratepayers fairly. The carrier will be allowed to eventually recover these expenses if no anticompetitive behavior is found, while the ratepayer does not subsidize the defense of a carrier that is found to have behaved anticompetitively.

18. We also tentatively conclude that this accounting approach does not constitute retroactive ratemaking. That doctrine generally forbids ratemaking that attempts to correct for charges that were either too high or too low in the past.[30] Deferral accounting avoids that pitfall by holding antitrust litigation expenses entirely outside the ratemaking process until it can be determined whether the expenses are allowable or not. We seek comment on our proposal and on our tentative conclusions. We also ask commenters to address the effects that deferral accounting for litigation expenses could have on carriers' incentives to settle or litigate.

19. In the *Litigation Costs Proceeding,* the Commission did not subject other antitrust litigation expenses to recapture if they were associated with a pre-judgment settlement. This policy was to encourage settlement "where such action would be in the best interest of the ratepayers."[31] Because we tentatively conclude that this approach is consistent with the ratepayer benefit principle to which we adhere,[32] we propose to allow antitrust litigation expenses charged to Account 1439 to be booked in operating accounts in the event of a pre-judgment settlement. The court, however, indicated that this approach may provide an excessive incentive for carriers to settle prior to judgment so that they can recover some portion of their litigation expenses.[33] We therefore ask commenters to address the incentives this approach creates.

C. Other Types of Litigation

20. In the *Litigation Costs Proceeding,* the Commission extended its litigation costs rules to litigation involving civil or criminal violations of any federal laws because (1) violations of federal statutes are not normal business expenses, (2) federal statutes raise public policy considerations, and (3) application at the federal level provides uniformity.[34] The court ruled, however, that the Commission may erect a presumption against recovery of these types of litigation costs only if the carrier's action underlying the lawsuit does not benefit ratepayers. Moreover, the court found that it may be the case that violation of federal law could benefit ratepayers:

> A carrier has to choose between instituting a strict pollution monitoring policy or a lax policy that is arguably sufficient under the law and would cost $50,000 less than the strict policy. The carrier will surely be sued under a federal statute if it adopts the lax policy, and there is a 10% chance that it will lose; if it does, the plaintiff would recover $100,000, making the expected or ex ante cost of the lawsuit ($100,000 x .10 =) $10,000. Thus the carrier reasonably determines that adopting the lax policy will produce a net benefit of $40,000 to the ratepayers, who would otherwise have to pay the cost of the strict monitoring policy. It would be misleading to say that requiring ratepayers to bear the cost of the resulting judgment, if any, causes them to subsidize the carrier's illegal activity.[35]

21. In light of the court's remand, we seek comment on whether and how the Commission could extend these rules beyond the federal antitrust context. We tentatively conclude that the proposed litigation costs rules should apply to both federal and state antitrust lawsuits. We see no basis for distinction since we have concluded that anticompetitive behavior does not benefit ratepayers, and anticompetitive behavior underlies both state and federal antitrust statutes. We invite comment on this proposal.

22. We also tentatively conclude that the litigation costs rules should apply beyond the antitrust context to lawsuits involving violation of federal statutes in which the actions giving rise to the suit did not benefit ratepayers. We limit our proposal to violations of statutes because expenses incurred in defense of common law actions have long been allowed for ratemaking purposes as expenses incurred as part of doing business.[36] We believe that this approach is consistent with the ratepayer benefit standard because most common law actions against carriers arise out of events that occur in the normal course of providing service to ratepayers, and ratepayers benefit from provision of service.

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[26] *Litigation Costs Decision,* 939 F.2d at 1043.

[27] *Id.* at 1044.

[28] We propose to use Account 1439. 47 C.F.R. § 32.1439.

[29] *See id.*

[30] It does not foreclose agency enforcement of preexisting obligations, however, even if that action requires the setting rates for a future period that are based in part on the costs of an earlier period. *See e.g.,* New England Tel. and Tel. Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied,* 109 S. Ct. 1942 (1989).

[31] *Litigation Costs Order,* 2 FCC Rcd at 3247.

[32] The policy is consistent because, the total amount recovered from ratepayers, including these other litigation expenses, should not exceed the "nuisance value" of the case. We believe that the "nuisance value" test is consistent with the "ratepayer benefit" standard.

[33] *Litigation Costs Decision,* 939 F.2d at 1046.

[34] *Litigation Costs Order,* 2 FCC Rcd at 3244, 3247-48; *Litigation Costs Recon. Order,* 4 FCC Rcd at 4094.

[35] *Litigation Costs Decision,* 939 F.2d at 1044-45.

[36] *See* 47 C.F.R. §32.6728. ("This account shall include ... payments in settlement of accident and damage claims.")

23. We propose to limit application to litigation costs incurred in the defense of claims of *federal* statutory violations because we believe that the diversity in state laws makes application of these rules to all state statutes impractical. Relatedly, we believe it to be an inefficient use of the Commission's scarce resources to review every lawsuit involving statutory claims.[37] Thus, we tentatively propose to apply the litigation costs rules in actions involving federal statutory claims which do not benefit ratepayers. We seek comment on our proposal and conclusions underlying it.

24. We seek comment on two options for implementing this proposal. One option would be for the Commission to review on a case-by-case basis the circumstances of any lawsuit involving a federal statutory claim in which a settlement or judgment exceeded some threshold amount. If the Commission determined that the carrier's actions underlying the basis of the suit did not benefit ratepayers, the settlement or judgment would be recorded below-the-line in Account 7370. The threshold amount could be set as an absolute amount, such as $5 million, or as a percentage of total operating expenses. We invite comment on this option, and ask commenters to address the incentives created by this proposal. We acknowledge that the case for deferral accounting for litigation expenses may not be as compelling in a situation in which neither the carrier nor the Commission knows at the beginning of a lawsuit whether or not an adverse judgment in the case would be disallowed. Therefore, we seek comment on three options for the treatment of litigation expenses related to lawsuits subject to case-by-case review: (1) require deferral accounting for all litigation expenses involving claimed violations of federal statute, so as to preserve the possibility of later disallowance in those cases in which judgments or settlements are ultimately disallowed; (2) require deferral accounting for such lawsuits once litigation expenses in a given case exceed some threshold level; or (3) allow above-the-line accounting.

25. The second option would be for the Commission to adopt in this proceeding a list of other federal statutes for which it can reasonably be assumed that actions in violation of the statute did not benefit ratepayers. Judgments, settlements, and litigation expenses for these suits would be treated, both for accounting and ratemaking purposes, the same as in antitrust cases. We ask interested persons to propose lists of such statutes and to explain the rationale for their lists. Finally, commenters should discuss the incentives created by this approach.

D. The Litton Accounting Appeal

26. As we noted previously, the Commission used an *ad hoc* approach to address the accounting for litigation expenses in the *Litton Accounting Proceeding*. The Commission there required AT&T and the BOCs to record the antitrust judgment and associated litigation expenses resulting from the Litton antitrust lawsuit in nonoperating accounts. Although the carriers had properly recorded the associated litigation expenses incurred throughout the trial in operating accounts, they were required to credit those operating accounts, and then charge the entire amount to a below-the-line account. The carriers appealed the Commission's treatment of the associated litigation expenses, and the Commission's action was vacated and remanded.[38]

27. The *Litton Accounting Appeal* was decided on the same day as the *Litigation Costs Decision,* by a different panel of the same circuit court. The *Litton Accounting Appeal* panel expressed views about the ratemaking status of antitrust litigation expenses that differ markedly from the policies endorsed in the *Litigation Costs Decision*. The *Litton Accounting Appeal* opinion leans heavily towards considering litigation expenses to be allowable even in the event of an adverse antitrust judgment. It cites as relevant precedent, for example, tax cases in which the Supreme Court overturned Internal Revenue Service attempts to disallow deductions, as a business expense, of legal expenses incurred by taxpayers convicted of business-related fraud.[39]

28. The *Litton Accounting Appeal* holding, however, was much narrower than the discussion put forth in the opinion. The court did not rule that litigation expenses could not be disallowed. Rather, in holding that the Commission had provided insufficient analysis to support its accounting treatment of the Litton litigation expenses, the court explicitly stated that it:

> [Did] not suggest that the Commission cannot provide an acceptable rationale for application of the challenged orders in the precise form in which they are, or that it is powerless to bind carriers to the strictures of those orders in some situations.[40]

29. We tentatively conclude that neither the holding nor the dicta in the *Litton Accounting Appeal* bars the course of action we propose above. We acknowledge that parts of the *Litton Accounting Appeal* opinion are not favorable to our proposals. To the extent that the opinions of the *Litton Accounting Appeal* panel conflicts with the guidance offered in the *Litigation Costs Decision,* we have chosen to follow the latter because it more closely accords with our own view of our responsibility under the Communications Act. Interested parties are invited to comment on the extent to which the decision in *Litton Accounting Appeal* should influence our future treatment of litigation expenses.

E. Interim Action

30. With the vacation by the court, there are currently no litigation costs rules in place.[41] We are concerned that carriers could pass onto ratepayers judgments and settlements which should not properly be borne by ratepayers during the period between release of this Notice and a final Order. Thus, we require carriers to record any antitrust judgments and settlements incurred during this interim

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[37] We recognize that, under this approach, carriers may very well pass onto ratepayers costs which did not benefit them. However, we believe this approach can be most realistically enforced. We also recognize that we have proposed a limited exception, state antitrust statutes. However, because we propose to apply the rules as a matter of course, and not under a case-by-case review basis, this limited exception does not further strain Commission resources.

[38] *Litton Accounting Appeal,* 939 F.2d 1021 (D.C. Cir. 1991).

[39] *Id.* at 1031-32, *citing* Commissioner v. Tellier, 383 U.S. 687, 86 S. Ct. 1118 (1966) and Commissioner v. Heininger, 320 U.S. 467, 64 S. Ct. 249 (1944).

[40] *Id.* at 1035.

[41] We note that we may exclude such expenses from carriers' revenue requirements under the "ratepayer benefit" standard affirmed by the court.

period in account 1439, deferred charges.[42] Upon completion of this rulemaking, carriers would then be allowed to treat these expenses in accordance with the new rules.

IV. PROCEDURAL MATTERS

A. Ex Parte

31. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[43]

B. Regulatory Flexibility

32. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act.[44] Because of the nature of local exchange and access service, the Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not "small entities" as defined by that act.[45] The Secretary shall send a copy of this Notice of Proposed Rulemaking and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of that act.[46]

C. Comment Dates

33. We invite comment on the proposals and tentative conclusions set forth above. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,[47] interested parties may file comments on or before **October 15, 1993,** and reply comments on or before **November 5, 1993**. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting comments. If interested parties wish for each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Interested parties should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. We also ask that parties send a courtesy copy of their comments to the Accounting and Audits Division, Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

V. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 219, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 219, 220, and 403, NOTICE IS HEREBY GIVEN of proposed amendments to Part 32 of the Commission's Rules, 47 C.F.R. §§ 32.1 *et seq.* described in this Notice of Proposed Rulemaking and Order.

35. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that, effective thirty days after publication of this Notice of Proposed Rulemaking and Order in the Federal Register, carriers will record any antitrust judgments and settlements incurred in the interim period between issuance of this Notice of Proposed Rulemaking and Order and issuance of a Report and Order in this rulemaking in account 1439, 47 C.F.R. § 32.1439.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

[42] 47 C.F.R. § 32.1439.
[43] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).
[44] 5 U.S.C. § 601(3).
[45] *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983).
[46] 5 U.S.C. § 603(a).
[47] 47 C.F.R. §§ 1.415, 1.419.